

LEGISLATIVE DRAFTING IN NINETEENTH CENTURY AUSTRALIA AND THE FIRST PERMANENT PARLIAMENTARY DRAFTSMEN¹

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This paper sets out to explore a largely unstudied aspect of Australian legal history. Many studies have been published about different areas of law and periods of reform or change in the law. Yet little has been written about the institutional framework by which such reforming legislation was prepared. In particular only the most tentative researches have been made into the individuals and institutions by whom legislation was actually prepared - the Parliamentary Draftsmen.

A. The problem of ensuring adequate drafting² of statutes and its resolution.

All the Australian colonies appear, at some time or another, to have encountered difficulty in finding a satisfactory procedure for the drafting of legislation. In the early days of most colonies (Queensland being an exception), the burden of the bulk of any necessary drafting was expected to fall on the colonial Law Officers. However on many occasions these officials proved unequal to the task set them. This difficulty was generally more acute in the

early years of each colony, when the law officers were often men whose lack of professional ability or experience, or indeed other defects of character, would have prevented their rise to office in later decades³. The reason for the employment of such incompetents is not hard to discern. These men were appointed largely because there were no better lawyers available at such salaries as colonial governments were able to offer. Even where officials were competent, they were often occupied with other duties.

The result was that, *faute de mieux*, the preparation of public bills often came to be entrusted to other hands. In some cases other officials were employed - South Australia furnishes a prime example when many of its first statutes were drafted by the Governor's secretary with unfortunate results: "of the seven Acts passed in 1837, two were disallowed, two more were marked down by the Commissioners for disallowance so soon as they could be replaced by better substitutes, but were forgotten, and a fifth proved almost useless".⁴

In some cases in the early years of the colonies the assistance of the judiciary was sought, and there are many examples in different colonies of judges preparing bills, such as the well-known role of Burton J in the creation of the bankruptcy statutes of New South Wales⁵ and the activities of A P Burt, Chief Justice of Western Australia, in drafting the Criminal Law Consolidation Ordinance 1865 and the Recovery of Debts Ordinance 1865 of the same year, as well as adapting English reforming legislation for the Supreme Court Ordinance 1861⁶.

As colonial societies began to mature, and particularly once internal self-government was achieved, the position changed again. When the position of Attorney-General became a political office, usually an important one, the calibre of the office-holder generally improved. However the pressure of political duties meant that it, in some colonies at least, it was even less likely

than before that the burden of statutory drafting could be borne by the political officeholders.

In some colonies at least a small part of the drafting of legislation was done by people not in current legal practice. Matters were still sometimes referred to the judiciary - Sir Charles Cooper as Chief Justice of South Australia in 1861 drafted a bill to regulate the sale of goods distrained for rent⁷. There were other non-practitioner draftsmen. In South Australia G F Dashwood, a stipendiary magistrate, prepared a bill for the payment of jurors in criminal cases⁸. That colony also provides one of the most unusual draftsmen. Ulrich Hubbe, better known in connection with the debate over the Torrens Title proposals, appears to have drafted at least one bill on his own account, intended to establish uniformity of succession on intestacy⁹.

The use of such alternative providers was sometimes the subject of criticism - in South Australia in the late 1860s, bills were often scrutinised by Cooper J, a practice which at least one politician considered constitutionally dubious¹⁰. Nor were expedients of this nature sufficient, in the larger colonies, to bridge the gap between the demand for the drafting of legislation and the capacities of the government ministers and officials. Inevitably the colonial governments had to look elsewhere. Even in colonies such as Tasmania and Western Australia where the burden of preparation of legislation fell on the Attorney-General or the other established officers of the Government, there appears to have been occasional recourse to outsiders.

Where the existing structures could not provide the drafting services required by the state of public affairs, the logical response was to place the preparation of at least some public bills in the hands of members of the legal profession - a "logical" response, because there had long been two spheres in which it seems

to have been a matter of expectation for most, if not all, of the century that bills would be prepared at private expense.

The first such sphere is in the measures whereby an individual or a syndicate was seeking to have the colonial parliament grant some special favoured status. In the early years such legislation most commonly took the form of private acts which sought the benefits of incorporation, as with the statutes for the incorporation of various banks¹¹. However similar statutes had been passed securing a right or privilege such as the right to charge tolls over a roadway or wharf¹² or, as was for much of the century the case, a statutory grant of patent rights. In any such case, it was apparently assumed that the parties seeking the statutory privilege were to be responsible for the drafting of the bill, though it would be subjected to review by the colonial Law Officers¹³. The same seems to have been true for special interest legislation such as the legislation passed to regulate whale fisheries in Van Diemen's Land in 1837¹⁴ and South Australia in 1838¹⁵.

The second, and perhaps more important second sphere was that of private member's bills. Nineteenth century parliaments accorded far greater importance to private member's bills than is now the case. In New South Wales it was the custom late in the century for there to be two days of Government business and two of private members business per week, although on occasion one of the latter could be used for Government business¹⁶. The general rule in most colonies for such bills was that their preparation was a matter for the private member concerned, and he would either draft the measure himself or pay for its drafting by a lawyer¹⁷.

Because drafting costs could be high - £40 to £50 on occasion¹⁸ - many private members' bills were abandoned¹⁹. There was a consequent and inevitable desire of members to obtain the assistance of Government funds, directly or through

through the services of a parliamentary draftsman, for the preparation of private members bills²⁰. Where a Parliamentary Draftsman was appointed, politicians were usually eager to seek and to give assurances that his services would be available to all²¹, even though such promises may not always have been carried out²². Where no draftsman was available, there may have been occasional cases where state funding was available. At some time in Victoria prior to 1863, a small sum appears to have been allocated for the drafting of bills introduced by opposition members²³. Another possibility was mooted in Queensland, where it was suggested by Griffith that the Government might pay for the drafting of particular bills initiated by members of the opposition (though not "frivolous proposals")²⁴. Whether anything came of this is unknown.

Once the decision was made that the preparation of legislation would need to go outside established governmental circles, the critical question was whether the work would be distributed among a circle of practitioners or be largely confined to one or two individuals. Here practices seem to have differed considerably. As is discussed below, South Australia for the whole century distributed drafting work relatively widely without giving security of employment to any one draftsman.

Commissioning individual lawyers to prepare legislation was not entirely satisfactory, for a number of reasons. Reliability may well have been a problem. Certainly there were occasions where the quality of legislative drafting gave rise to continuing political controversy. Perhaps the best known of these was in connection with the Land Act 1862 of Victoria, which largely proved ineffective in curbing the squatter control of rural lands because conditions imposed on the purchaser of land from the Crown it were not, under the Act, binding on persons to whom the land was assigned. The Act was apparently drafted

especially by W.E. Hearn²⁵, then Professor of Law at Melbourne University (who received £500 for his efforts). The then premier, Gavan Duffy was later to assign the blame for the failure of the Act not to its draftsman, Hearn, but to the failure of Richard Davies Ireland, the Attorney-General at the time of the bill's introduction, to ensure the assignee's position was covered. Ireland in 1867 made a speech which could be interpreted as meaning that he had realised the flaw in the drafting of the crucial sections while they were being prepared, but had not then disclosed the difficulty to his political colleagues²⁶. Whether or not this was the case²⁷, it is certain that Ireland's political career was devastated.

Cost was not the only ground on which the appointment of permanent draftsmen was advocated. many proponents of the office appear to have been of the opinion that it would prevent the diversion of public funds for patronage or partisan ends. Arguments ranged from that of a South Australian conservative that the payment of drafting fees to a member of parliament was unconstitutional²⁸ to the view expressed by Melbourne journals in 1858 that payment of legal fees to members of parliament allowed a hidden and corrupt method of political advantage to the Government²⁹. Similar allegations of the abuse of patronage powers were made in Queensland³⁰. It is not surprising to find that Ministers would on occasion seek to show that their selection of lawyers for drafting work was not influenced by questions of party orientation³¹.

In other cases the attack on the briefing out of drafting seems no more than a special case of the suspicion of lawyers which appears endemic in colonial circles of the time. Thus one politician could claim that the Victorian Government had been charged high fees for inferior work, including fees for bills never actually introduced.

"In fact it would appear that the proceeding had been adopted as a quiet way of pensioning off poor gentlemen of the legal profession"³²

This and similar accusations brought calls for measures to make draftsmen more accountable by showing on the face of the bill the fees paid for its drafting³³, or that a fixed scale of fees should be established³⁴. Neither suggestion was adopted.

B. Colonial Responses: parliamentary drafting and Parliamentary Draftsmen.

It was a logical response to the problem to consider the appointment of a government official who would be responsible for the preparation of legislation. New South Wales appears to have initiated the specific office of "Parliamentary Draftsman" in New South Wales in 1856, where the title was conferred on two barristers who were supposed, in some nebulous manner, to undertake a part-time obligation to appraise English legislation for reforms that should be adopted in New South Wales. These first office-holders were only expected to spend a part of their time on the drafting duties. It appears that this proved unsatisfactory and New South Wales moved to a permanent official in the 1870s. Victoria first created the post as a full-time one. There had been proposals, going so far as the placing of appropriate sums on the Estimates, of part-time appointments in 1856 and of a full-time appointment in 1866, although neither appear to have reached the stage of appointments being made³⁵.

These developments represent the greatest movement toward a professional drafting service. Developments in the other colonies are discussed below, but they can be summarised by saying that they all lagged behind New South Wales and Victoria. Queensland, despite an early start, appears to have only had part-time draftsmen until well into the twentieth century, and if South Australia ever appointed a specific official, it was for the briefest of periods. Tasmania appointed a draftsman only in the last years of the century, while Western Australia appears not to have had such an official at all in Victorian times.

It is clear that the Victorian decision to appoint a permanent and full-time parliamentary draftsman was largely motivated by a desire to cut the cost of

statutory drafting, though this may not have been the sole reason. The debate on the Law Department Estimates in 1879, which contained provision for a sum of £610 for the annual salary of a permanent full-time Parliamentary Draftsman, is informative. The debate indicates a consensus that the change was a good one, though concern was expressed about the availability of the Parliamentary Draftsman's services for the preparation of private member's bills and Opposition measures. Indeed, the most frequent comments doubted that a single draftsman would be able to keep pace with the demands for his services, and a belief that the overall costs of legislative drafting would be diminished. On this point Sir Bryan O'Loughlen, the Colonial Secretary, indicated that some contracting out to persons with special expertise would still occur, but that it was expected that the overall cost of preparation of Bills would decline substantially from the £4,000 - £5,000 allegedly spent in some prior years³⁶.

By contrast, it is not clear exactly why New South Wales changed in 1877 from part-time parliamentary draftsmen to full-time officials. It seems a reasonable surmise that it was thought the government would receive better and more economical service from a single salaried, full-time Parliamentary Draftsman at a salary of £1100 p.a., the figure first settled on, compared to sums then spent, of £250 p.a. paid to the part-timers³⁷ and the presumably sizeable fees paid for other legislative materials briefed out to other members of the profession. It may also be that the case for a full-time draftsman was perceived to be stronger because the British Government had created the position of Parliamentary Counsel in 1869. If that factor was significant, some mention of the British office could be expected in the occasional public debates on the Australian offices. No such references appear in the available documents but since these are far from comprehensive the possibility that the inception of the British institution affected the colonial practice cannot be ruled out.

In later years the staff of the office expanded. Details are sketchy, but in the early 1890s, the New South Wales Parliamentary Draftsman had both a senior and a junior assistant, although the former position was terminated in 1896. This termination was presumably a cost-saving measure, since the senior assistant had received £700 per year, compared with the Draftsman's salary of £830 and the junior assistants of £350³⁸.

C. Draftsmen in the various jurisdictions

1. New South Wales .

One of the first identifiable part-time salaried draftsmen in New South Wales was William Hattam Wilkins, who became Parliamentary Draftsman in 1864 and for some years combined this office with temporary commissions as a District Court Judge. As with parliamentary draftsmen in other colonies, Wilkins had the advantage of personal ties to persons in authority - in his case through his uncle, Frederick Wise, a judge of Supreme Court. Again as was the case in other colonies, Wilkins was neither very experienced nor very old - in 1864 he was 33, had been admitted to the bar in 1858 and had then spent some years as a clerk to his uncle³⁹. Another early draftsman was Alexander Oliver (of whom more anon), who served in a part-time capacity from 1865 to 1874 when he resigned to become the Examiner of Titles.

On Oliver's resignation, one C J Manning was appointed to the post of Assistant Parliamentary Counsel to Attorney-General, at the less than

munificent salary of £200 on the basis that:

"it was understood that a co-draftsman should receive £400 as Government Draftsman and that I should do the work for private members and assist the Government Draftsman only at times".⁴⁰

It is not apparent that in fact Manning did much work on private member's bills, but any practice of having an official concerned with such a separate function does not appear to have survived Manning's resignation in March 1875, which came when he was refused extra emoluments in return for the additional work required because the Parliamentary Draftsman's office was then vacant.

Some indication of the attractions of the part-time office can be gauged from the applicants for the (part-time) vacancy caused by the resignations of Oliver in 1874 and Manning a year later⁴¹. The applicants included George Milner

Stephen,, C. Lansdell, the young Edmund Barton and a Pierce O'Keeffe who later withdrew. Of these, Stephen and Lansdell had considerable professional experience. Stephen's very chequered past⁴² and unusual contemporary avocation of faith-healing appears not to have prevented him from arraying a formidable degree of political support - in 1875 he produced a supporting letter signed by about 30 members of the New South Wales legislature. His case was also supported by his brother, Alfred Stephen the former Chief Justice of New South Wales. Stephen received appointment as a part-time Draftsman in 1877, but had to relinquish the post when it became obvious that he could not reconcile the demands of that position with the calls made on him by seekers after his curative powers⁴³. Lansdell's background is less clear, but he too apparently had relevant experience. Lansdell, was to claim in his application in 1874 that he had been frequently selected by the Governments of Queensland and Tasmania"

to prepare Bills, rules and Regulations, reports and other parliamentary drafts of special and difficult character"⁴⁴

By contrast, Edmund Barton, then in the first stages of a career which would carry him to far greater things had then only been at the bar for a few years, having been admitted in 1871⁴⁵.

The first full-time appointment was of Alexander Oliver, formerly a part-time Parliamentary Draftsman 1865-74. It is notable that Oliver had at the time of his first appointment in 1865 only been at the New South Wales bar for a year, and perhaps his appointment owed something to the cachet of his having read for the English Bar (called 1862). Oliver took over the full-time office in 1878 and retained it until 1894 ⁴⁶.

Of the Parliamentary Draftsman at the end of the century less is known . John Leo Watkins was apparently born in Hobart, educated at Sydney Grammar and at Christs's College Cambridge, where he graduated BA in 1871. He was later

admitted to the New South Wales bar. He served as Parliamentary Draftsman from 1892 to 1918⁴⁷.

The creation of a permanent parliamentary counsel did not terminate the involvement of other draftsmen in New South Wales. There was still a very considerable amount of drafting which was contracted out to members of the profession. For most of the 1880s and 1890s, the government estimates had provided a sum initially of £600, from 1888 £300 each year for outside drafting work, principally of bills, though some commissions were for court rules and the like. In the decade 1883-1892, it seems the total such expenditure was around £2635 (£252-10-0 being on Rules). The amounts actually spent varied, in no apparent relationship to the amounts voted, from a low £21 in 1886, £40 in 1886 and £63 in 1889 to the much higher figures of £566-15-0 in 1887, £541-17-0 in 1890 and £648-10-0 in 1891. While seventeen different counsel appear to have received portions of this money for their drafting in the period, two recipients stand out. A.R. Butterworth received more in total than any other draftsman, £367-10-0 in 1887 and £521-17-0 in 1890, the latter for "water, sewerage and Drainage" bills. Even so Butterworth's receipts for 1890 were smaller than the £577-10-0 paid to A. de Lissa in 1891 for a "Banking Bill and Life Assurance Bill"⁴⁸.

The inception of the full-time office of Parliamentary Counsel in New South Wales may perhaps have limited the frequency with which the judiciary were consulted on proposed legislation, but it certainly did not put an end to the practice. In 1887, for instance, the Chief Justice corresponded with the Minister of Justice over possible amendments to the legislation controlling the Supreme Court. In the same year there was further correspondence over the judges' recommendations for changes to the Probate Act. The next year saw the judiciary recommending the repeal of the Criminal Law Amendment Act 1884

(which they regarded as imposing unreasonably harsh sentences)⁴⁹; in 1892 the Judge in Bankruptcy appears to have been the primary source of instructions as to the drafting, by the Parliamentary Counsel, of the Bankruptcy Amendment Bill⁵⁰

The degree to which the New South Wales Parliamentary Draftsman's office dominated the preparation of bills in the last years of the century is revealed in letters written by John Leo Watkins, the then Draftsman, to his counterpart in Victoria. Watkins described the staffing of his office, (himself and then only one assistant). Clerical assistance was furnished by the Attorney-General's department. Watkins indicated that the Parliamentary Draftsman prepared most government bills - he personally had contracted out only one, but some government departments did brief out the preparation of legislation, instancing Land and Income Tax Bills, a Public Services Bill as well as one to reform the Upper House. The Parliamentary Draftsman was not directly involved in the consolidation of the statutes, which was done by a separate staff. The Parliamentary Draftsman also reported on all by-laws that required approval of Attorney-General or Governor, and drafted regulations issued under the Governor's authority⁵¹.

One bill drawn by an outside draftsman in this period was a "Bill for the better Administration of the Estates of Deceased Persons" drafted in 1884 by Frederick Chapman, Prothonotary of Supreme Court and a former Curator of Intestate Estates. Chapman sought payment of 50 guineas - allegedly the 'usual fee' for an Act of this kind - for his labours, on the basis that he had drawn the bill outside office hours. He claimed to have freed the measure from the difficult terminology previously used, and to have collated the statutes of other colonies and adapted from them such innovations as seem desirable. Certainly he made heavy use of the Intestacy Act 1878 (Qld), since 9 of the first

17 clauses in an early draft are annotated by reference to the Queensland statute. Even so, it took six months and two reminders before the drafting fee was paid⁵².

2. Victoria

Much more information is available about Watkins's Victorian counterparts. The first and longest-serving Victorian Parliamentary counsel was Edward Carlile. He was born in England in 1845, but came to Victoria in 1854. He studied at Melbourne University and was then admitted to the bar. He held the office of Parliamentary Counsel from 1879⁵³ to 1882 and again from 1889 until 1906. In the intervening period, he was Clerk of the Legislative Council⁵⁴. We may note that Carlile's long tenure of office was not untroubled - in 1899 a Classification Board considered all Civil Service positions. Among its recommendations was one that Carlile's salary be cut to £1,000 (from, it seems, an apparent £1,300) as his work did not justify the higher amount. Carlile reacted by seeking support for others to indicate that the reduction was unreasonable. There is no data to reveal whether his objections were successful⁵⁵.

One curious feature of Carlile's work is that, among the small sample of Victorian Bills of which the preparatory papers have been preserved⁵⁶, there are three where he worked from a South Australian original. One was the Land Surveyors Bill. The second is the Architects Bill 1892. This again was originally a private measure which was adopted (over internal opposition from government departments) as a government measure. Carlile's draft does not work direct from the documents submitted by the society of architects but is an annotated copy of South Australian Architects Bill 1889⁵⁷. The third is the Sale

of Goods Act 1895-6, where the instructions to the Government printer include of the bill supplied is a cut-and-paste version, with annotations, of the South Australian Sale of Goods Bill 1894. This adaptation, with its consequential renumbering of sections from the English, is not mentioned in the draft Explanatory note to the bill, which is the printed text of the House of Lords Explanatory note to the United Kingdom Bill, with appropriate handwritten amendments as to re-ordering⁵⁸.

More is known about the personal, though less about the professional, life of the other Victorian parliamentary draftsman, John Augustus Gurner, since late in life he published his memoirs⁵⁹. Gurner was the son of a wealthy and successful Melbourne lawyer, a sometime Crown Solicitor of Victoria. He was sent to England for his secondary education, then went to read law at Cambridge, where he graduated in 1877 (thus being the third Oxbridge graduate of the four permanent full-time Parliamentary draftsmen in pre-Federation Australia!). He spent some time in a London solicitor's office pending his call to the English bar in 1877. He left England in 1879 for Melbourne and the Victorian Bar but tarried long enough en route in Sydney to be admitted to the New South Wales bar. He practised as a barrister in Melbourne from 1879 to 1882, when he took up the post of Parliamentary Draftsman for Victoria - initially as a temporary position, for duration of the parliamentary session. However, contrary to Gurner's expectations, the session lasted from 1 April to the end of year. A permanent appointment followed in January 1883, and Gurner held office until 1889, when he became a Crown prosecutor. While his book is productive of these biographical details, it holds little of interest to anyone studying his professional role - indeed, since it is perhaps the most boring of volume of reminiscences ever published by a lawyer, it holds little interest for anyone. It is likely however that relations between Gurner and the politicians of the day may well have been uneasy. Gurner appears to have

Gurner appears to have acquired, either from his family circumstances or his experiences in England, a pseudo-aristocratic culture and a dislike of politicians as a class⁶⁰. Nevertheless he appears to have had much to do with the final form of some significant pieces of legislation of the period, the Mining on Private Property Act 1884 and the legislation setting up independent Statutory Boards to control the Victorian Railways and Victorian Public Service⁶¹, an administrative mechanism apparently rarely used before this. Indeed Gurner claims that at the time he had to draft the measures, the only one precedent for it was a local government board in England.

3. Queensland

The history and the origins of the Queensland part-time Parliamentary Draftsman are alike obscure and have been largely neglected by previous writers⁶². Quite possibly its origins are simply a case of the government of the day assuming that as New South Wales had such an official before separation, Queensland should have one. The first incumbent appears to have been John Bramston, who held the office in the 1860s. Precision here is impossible - Bramston's brief biography in the Australian Dictionary of Biography does not even mention his tenure of the post⁶³. In 1865, Bramston was offered the position of Attorney-General on the resignation of Ratcliffe Pring but resigned after serving but a few days. This appears to have been consequent on the failure of a plan to make the Attorney-Generalship non-political, as a result of which Bramston could not both be Attorney-General and retain his salaried offices as Parliamentary Draftsman and Master of Titles. He chose the security of the salaried offices⁶⁴.

Such a part-time appointment raised a number of problems. In 1863, the then Attorney-General, Ratcliffe Pring forwarded to Bramston a copy of a minute by the Executive Council that:

"your private professional avocations cannot be allowed to interfere with the discharge of your public duties"

a minute provoked by Bramston's absence in Rockhampton for court circuit. Such criticism was not warranted in this particular instance, as Pring had in fact given Bramston leave to go on circuit (a fact not known to the Executive Council), but the incident does show the difficulties inherent in the use of part-time officials⁶⁵. Nor were the difficulties limited to the practical. Bramston was also a member of the legislature. In 1864 a member of the opposition raised the question of whether it was:

"contrary to strict Parliamentary uses for the Parliamentary Draftsman, a salaried officer of this Parliament, to vote at divisions"⁶⁶.

The existence of the Parliamentary Draftsman did not mean that the Attorney-General ceased to draft bills - in 1862 Pring was contemplating preparing personally a bill to consolidate the law of insolvency in the colony⁶⁷ - but the Attorney-General's role may well have been minor. In 1865 Governor Bowen sought to describe the peculiar status of a colonial Attorney-General, but drafting of legislation finds no place in his lengthy catalogue of duties attaching to the office⁶⁸.

It seems that on Bramston's relinquishing the office, there was no official Parliamentary Draftsman until 1899. In part at least the absence of an official is due to the remarkable influence and labours of Samuel Walker Griffith. Griffith's dominant position in legal practice and in politics has been well described⁶⁹, but his eminence in drafting has not always been emphasised. Even a parliamentary opponent was prepared to describe him as the best Parliamentary Draftsman in Australia⁷⁰. It seems clear that Griffith drafted many bills both in office and in opposition⁷¹, although much was still briefed

out. The 1890 estimates allowed £1000 for such outside drafting; in 1891 the figure was £800⁷². It appears that in 1889 the Government had considered the appointment of a parliamentary draftsman, but had concluded that no single draftsman could cope with all the work required, and that the system of briefing out offered better value for money as lawyers with particular expertise could be selected, a process which might produce better bills.⁷³

What other, limited, evidence there is indicates that for most of the rest of the century Queensland legislation was prepared either by it being briefed out to private counsel or it was drafted personally by the Attorney-General. Two early Attorneys-General, Ratcliffe Pring and Charles Lilley, were prolific lawmakers - indeed the large number of statutes passed in 1867 has been attributed to the rivalry between the two⁷⁴. Apart from that, archival sources reveal only that the Friendly Societies Amendment Bill 1894 was apparently prepared for the Registrar of Friendly Societies by an outside draftsman⁷⁵ and that in 1898, 12 different draftsmen prepared government bills, although seven of these prepared only one bill⁷⁶. Of these one, J.L. Woolcock, was appointed Parliamentary Draftsman on a part-time basis in 1899, holding that office to 1927⁷⁷.

4. Western Australia

Information about the process of legislative drafting in Western Australia is scanty. Certainly it appears that the bulk of the drafting of Government bills was done by the Attorney-General, both before and after the attainment of responsible government. On occasions this may have resulted in some delays in the introduction of legislation⁷⁸. However the economic circumstances of the colony did not permit the employment of a salaried Parliamentary Draftsman⁷⁹.

Despite this, many bills were prepared by the Attorney-General with recourse to outside draftsmen on few occasions.⁸⁰

It paucity of these official resources may go far to explaining the occasions on which the Premier, John Forrest sought assistance from other states. He made enquiries of the New South Wales government concerning legislation in force in New South Wales relating to sweepstakes on horse-races⁸¹ and later concerning the regulation of chemists. Forrest supplemented such official sources with private enquiries of leading lawyers in other states. Thus in 1890 he asked S W Griffith for a copy of a proposed amendment to the Queensland Audit Act, going on to say:

"and I will be glad also to receive any of your acts which you can recommend to me"⁸².

Later that year Forrest asked Griffith:

"Have you a law relating to Entail?; if so please send it me - some of our properties are entailed and a measure must be devised of improving them"⁸³:

5. Tasmania

Tasmania appears to have been somewhat similar to Western Australia in that it relied for almost the entire nineteenth century on the efforts of the Attorney-General. It appears that these efforts were supplemented in various ways. There was at least some briefing out of the preparation of bills - a New South Wales barrister, C. Lansdell, was to claim in his application for the post of Parliamentary Counsel in New South Wales in 1874 that he had been frequently selected by the Governments of Queensland and Tasmania to prepare Bills, rules and Regulations, reports and other parliamentary drafts of special and difficult character"⁸⁴

However reliance on external resources was probably on a small scale - it is notable that there is no mention of fees for statute drafting in the official return

of governmental monies paid as fees to lawyers other than Law Officers for legal work over a two year period from June 1873 to June 1875⁸⁵. In the 1890s, the Attorney-General was also assisted by the efforts of a Legislation Committee of the local Law Society⁸⁶. There also appears to have been at some time a draftsman employed within the Attorney-General's office to draft legislation, a position which in 1899 gave rise to the appointment of W.O. Wise as the first officially-styled Parliamentary Draftsman⁸⁷.

6. South Australia

Some perspective on the total costs of legislative drafting in the other colonies, especially Victoria and New South Wales may be gained from the albeit fragmentary evidence from South Australia⁸⁸, where there was at most a fleeting appointment of a lawyer as a permanent parliamentary draftsman. Fortunately the Parliamentary Papers contain a number of returns of fees which indicate the scope of the briefing out process. In the period 1857-1861 drafting fees were paid on 17 occasions. R. Ingleby was the recipient in 12 of these instances, for fees ranging from 10 guineas to 75 guineas. Most of the other fees, though these were much smaller, went to J P Boucaut. Annual costs went ranged from £55 in 1858 to over £200 in 1861⁸⁹. These figures are relatively small by later standards. In 1879, a total of 66 bills were apparently introduced into the legislature. Of these, eleven had been prepared by the Attorney-General, and nine were private member's bills for in relation to which the government incurred no expenditure. The remaining 46 bills were prepared by 12 different lawyers, at an aggregate cost of £957-15-6. Identification of the draftsmen is in this case not possible, but it is obvious that some must have been simpler and cheaper to prepare than others. Thus W. Moore received £61-19-0 for 14 bills, the most by any one lawyer, while the recipient of the highest total paid was

total paid was Bakewell, who was paid £341-15-0 for 5 bills. The variation is also shown by Grundy obtaining eight guineas for one bill, while Ingleby received £105-0-0 for his single effort.

A similar pattern appears the following year, when 65 bills were introduced, 13 of which had been drafted by the Attorney-general, eight were private members bills and one, the supply bill, had been drafted by the Clerk of the House of Representatives. The remaining 43 bills were again widely distributed over 13 lawyers, with Moore again leading the numbers with 13 bills, at the slight cost of £58-16-0. Bakewell again topped the total costs, with £417-8-0 for 6 bills, though the highest rate was by the firm of Ingleby and Grundy who received £310-0-0 for two bills.

By contrast, the later, less complete, records seem to indicate a much lower expenditure, though this is not certain because in both years a number of bills were prepared by "Politicians, various" and by government officials, with no costs provided. Whether this means there were no costs, or whether they were charged to another departmental vote is uncertain. In both 1894 and 1899 the Attorney-General was the most prolific draftsman, with 23 bills of 54 and 15 bills of 35, respectively. The really striking feature of those years is that the number of bills briefed out is very much lower than in 1879-80, with only 11 bills briefed out in 1894 and four in 1899. The costs also fell, though not in proportion to the decline in numbers - in 1894 the 11 bills cost £444-5-0 the four bills in 1899 cost £312-10-0, (£250 of which was paid to Hackett & Anderson for one bill). These records must be treated with some care - it is clear that on occasion the government was reluctant to pay the sums charged and negotiated fees down ⁹⁰, in others it appears that more than one draftsman received a fee for work on an particular bill⁹¹.

With sums of this size being spent on drafting it is not surprising that there was some discussion at different times of the creation of at least a de facto Parliamentary Draftsman. The idea was twice suggested by would-be holders of the office. In 1865 Charles Mann junior had proposed an arrangement whereby he would all necessary "bills for Parliament" for £300. Mann's argument was that Mann personally had been paid £97 in 1864, and his firm of Wrigley & Mann the sum of £273 in the same year. On that basis, the lump sum proposed would be a saving, as well as avoiding the difficulty of formulating appropriate charges for drafting. Mann contended also that there would be a benefit in the greater uniformity of style if all legislation was prepared by a single draftsman⁹². It seems nothing came of that proposal, but there are a number of other records indicating that Mann was given various bills to draft, including at least one, an 1867 Bill on the subject of licensed carriages, where it seems that the initiative came from him rather than from the Attorney-General⁹³.

The second suggestion came in 1866, when one Charles Lowe offered his services to work under the Attorney-General as "Government Parliamentary Draftsman and Assistant Crown Solicitor" for a total sum of £600 per year⁹⁴. This offer was not taken up, but Lowe was engaged on occasion to draft bills of a relatively minor character dealing with, inter alia, the Supreme Court and immigration matters⁹⁵. It seems likely that Lowe's conduct of affairs in this period did not entirely satisfy the government, as in 1868 he was soliciting occasional employment in the drafting of bills, and, somewhat plaintively, indicating that although he did not practice in Adelaide, he could easily travel there on a day's notice⁹⁶.

There is some fragmentary evidence that for a brief period there may have been someone recognised as the Parliamentary Draftsman. In 1885 a

parliamentarian asked for a return of costs of bills prepared "during the Parliamentary Draftsman's term of office", a term which apparently came to an end in 1885⁹⁷. If such a return was made, it has not come to hand. However in that year a return of the general legal fees paid by the South Australian Government enumerates extensively various conveyancing and court fees, but notes that it *excludes* £800 paid to "Hon C. Mann" as "contractor for legal business"⁹⁸. It may be speculated therefore that Mann was, for a time at least, had the status, either de facto or de jure, of a Parliamentary Draftsman.

D. The Operation of the New South Wales Parliamentary Draftsman's Office.

The meagre archival materials extant give little information about the functioning of the office of Parliamentary Draftsman in Victoria or Queensland. By contrast there are fuller archival sources for New South Wales, and it is from these that most can be learned about actual operations of the draftsman's office.

(i) Duties

In New South Wales, the duties of the Parliamentary Draftsman were defined by a Cabinet Minute at the time of the appointment of Alexander Oliver in July 1878⁹⁹. The duties of the Parliamentary Draftsman were stated to be to draft Bills for Ministers, as directed, to peruse and report on the effect of alterations in Bills during their passage through the Legislature as well as reading and reporting on all Bills introduced by private members, to make himself "acquainted with the alterations from time to time in Imperial Statutes law and reporting thereupon when any seem adapted to the requirements of this Colony". In addition to this work on parliamentary matters, the Parliamentary Counsel was to peruse and report on Bylaws, rules and Regulations submitted to Attorney-General and to prepare regulations "for carrying out the intentions of any statute", as requested.

By contrast, in 1881 the New South Wales House of Assembly was told that the Parliamentary Draftsman would draw private members Bills (and had drawn four in that session) if the member had leave to introduce the measure, unless the pressure of Government business made this impossible. It appears that in that session the Parliamentary Draftsman had prepared 15 Bills for Ministers,

and four for private members¹⁰⁰. This may well have somewhat misrepresented the position by indicating a greater degree of willingness to draft private members bills than was in fact the case. Throughout the 1890s, the then Parliamentary Counsel, J.L. Watkins regularly sought, with varying degrees of success, to fend off requests or instructions to draft bills for private members. In some cases it seems that Watkins was able to insist his conditions of appointment did not require him to draft such measures¹⁰¹. In other cases it appears that the Attorney-General was persuaded to order the Parliamentary Counsel to assist with the drafting of private measures¹⁰²; in still others it seems that Watkins freely co-operated with the proposer of a private measure¹⁰³.

Not surprisingly there were constant attempts by back-benchers to obtain, without charge, the services of the salaried Parliamentary Draftsman. It seems that when Alexander Oliver was first appointed as a part-time Parliamentary Draftsman, he was expected to draft private member's Bills on request, if his commitments to official matters permitted. It appears that he was concerned with the drafting of some substantial pieces of legislation on this basis¹⁰⁴. Certainly only a few years later the Cabinet minute referred to above showed that the Parliamentary Counsel was expected to review private members' bills prepared by others, rather than to draft such measures himself.

As can also be seen in New South Wales, the Victorian draftsman on occasion drafted private members bills because the government had agreed to support the measure. One example discussed earlier was the Land Surveyors Act 1895-6. A second is provided by the Indecent Medical Advertisements Act 1899-1900. This originated as a part of a draft bill prepared in 1897 to deal with various issues relating to indecent publications, and prohibited the publications of advertisements which were indecent as dealing with, in drawings, pictures or

drawings, pictures or print, "venereal or contagious diseases affecting the generative organs". Legislative action on such advertisements may have been prompted by a similar, though less well-drafted New South Wales Bill introduced some months earlier, though in fact New South Wales later adopted the Victorian bill as revised in 1898¹⁰⁵.

One curiosity of the period which must have affected the Parliamentary Draftsman's task was the omission of punctuation from New South Wales statutes for many years after 1861¹⁰⁶. Although there was a suggestion in 1883 that the colony should revert to its earlier practice of at least publishing its statutes in punctuated form, the proposal foundered in the conservatism of the Legislative Assembly¹⁰⁷.

Although this account has focussed on the drafting of legislation by the New South Wales Parliamentary Counsel, it must be remembered that he had also to scrutinise legislation prepared by others. This was no sinecure, since some bills contained significant but subtle defects which needed urgent remedy. Thus in 1893 Watkins had to point out to the Attorney-General that a clause in the Common Law Procedure Bill 1893 could impliedly fuse the common law and equitable jurisdictions of the Supreme Court, something which the bill was certainly not intended to do¹⁰⁸.

On rare occasions Watkins ventured to comment on the policy aspects of bills in preparation, as when he suggested in 1893, apropos of a new Stamp Duties Bill, that financial considerations might indicate a need to repeal provisions of the Stamp Duties Act 1890 which had exempted from duty mining share transfers (apparently in an attempt to encourage mining companies in other colonies to change their base of operations to Sydney)¹⁰⁹.

Inevitably many bills were significantly amended or redrafted during their progress through the colonial parliament. It seems that in New South Wales the parliamentary counsel was rarely involved at this state of the bill's proceedings¹¹⁰. This both made clear the need for politicians of skill in drafting and also gave scope to such politicians. Sir Frederick Darley, according to Bennett, "often ... acted as 'standing counsel' of Parliament, being called upon to draft or revise legislation"¹¹¹. This may have been because it was thought that it would be asking too much of the Draftsman to appreciate the full scope of every significant debate on the Bill¹¹².

(ii) Procedures

On occasion the instructions to Oliver seem to have been rather lacking in detail, though a lack of precision appears most commonly where the proponent of legislation intended to imitate legislation in force in other colonies. Thus when T.W. Garnett instructed Oliver to prepare a bill for the payment of members of the Legislative Assembly, he set out the scale of payments he had

in mind, continuing :

"some other provisions excepting Ministers, Speaker and Chairman of Committees will be required but these you'll readily obtain from the Victorian Act, which I have not at hand".¹¹³

Similarly when Parkes directed the preparation of an new Electoral Bill in

1879, he simply stated

"You will get details of self-registration from Victorian Act where the system is in force"¹¹⁴.

Certainly the Parliamentary Draftsman on occasion appears to have been criticised for defective legislation. In some cases this may have been unfair. After the drafting of the Crown Rents Bill 1890 was the subject of considerable criticism in the New South Wales parliament, a correspondent to the Daily Telegraph questioned the role of the Parliamentary Draftsman in its preparation. In this case at least the criticism may have been ill-founded, since

it seems the defects arose from amendments in the legislative process. In this case, as was the usual practice, Ministers did not consult the Parliamentary Draftsman as to the effect of such amendments¹¹⁵. However Griffith expressed the view that:

"the bills presented to the New South Wales Parliament are notoriously the worst drawn in any Australian colony "¹¹⁶

There were also cases where Oliver acted in a private capacity even though the Government had refused to provide assistance for a private measure - in 1893 he, as a former Registrar of Friendly Societies, offered to draft a new Friendly Societies Bill though the Government had refused its backing for the measure¹¹⁷. Even after relinquishing the post of parliamentary Draftsman, Oliver was on occasion still involved in the preparation of legislation. It seems in 1897 he prepared a new Rabbit bill, and around the same time made suggestions for amendments to bills on land allocation and fisheries¹¹⁸.

In some cases the involvement of the Parliamentary Draftsman in major measures during this early period appears to have been a matter of chance. One curious case is that of the various amendments proposed to the Real Property Act 1862. Although in 1863 Oliver was involved in proposals to reform the New South Wales statute, inter alia by the adoption of Victorian amendments, this was in his capacity as one of the Examiners of Titles under the 1862 Act. Indeed it seems the principal legislative architect of later changes was his coadjutor as examiner, G.K. Holden, who made extensive proposals for change in 1865¹¹⁹.

(iii) Sources

In any colony legislation can be traced to one or more of three broad sources - local initiative, English legislative models and the innovations of other colonies¹²⁰. Without entering into the necessarily contentious enquiry of which of these was dominant in any one colony at any one time, it may be noted that it appears that the various persons charged with the preparation of legislation were well aware of the value of both the latter sources. The correspondence of the New South Wales Parliamentary Counsel gives us some indication of the range of comparative materials which that office sought. In 1878 Alexander Oliver, the then Parliamentary Counsel, requested a number of law books, the Law reports of New South Wales and Victoria and the "statutes of the other Australasian colonies (to be supplied as issued)"¹²¹. Soon Oliver broadened the scope of his requests - in 1880 he asked not only that copies of Victorian, Queensland, South Australian and New Zealand statutes be ordered direct from the various colonies, as they were not regularly available in New South Wales, but also that:

"I would at the same time invite attention to a serious want in my Series of Colonial and other Acts of Parliament; viz, of the Canadian and the American Acts of Congress"¹²²

In later years further resources were requested, as in 1893 when the Parliamentary Counsel asked the Attorney-General if he could arrange for the supply of the text of Government Bills introduced into the British Parliament, as these were necessary if the debates on bills were to be understood: "and the measures which fail to become law, owing to press of more important business, are often as valuable to the draftsman as measures which have passed the Legislature"¹²³.

Whatever arrangements were made for the supply of statutes from other colonies, they cannot have been uniformly effective. It was only in 1887, for example, that Oliver received the Victorian and New Zealand statutes dating back to 1881; as well as those of Tasmania since 1877, Queensland from 1878

and South Australian statutes since 1879¹²⁴. Nor does it seem that his successor, J L Watkins, fared much better, since in 1894 he was requesting the supply of statutes from the various colonies to remedy deficiencies in his official library. His requests included the New Zealand statutes since 1881, as well as those of Queensland since 1888 and South Australia from 1887. The holdings of Victorian statutes were apparently better, since only those since 1892 were requested¹²⁵. Special requests for the collection to be kept up to date still recur in later years¹²⁶. In among this welter of comparative material, it is perhaps surprising that it is not until 1896 that the Counsel's office attempts to secure as complete a collection of bills introduced into the New South Wales Parliament¹²⁷.

On some occasions officials or proponents of legislation appear to have supplemented the resources of the Parliamentary Counsel by supplying copies of comparable legislation from other jurisdictions, on subjects as diverse as the regulation of licensed victuallers, local government and married women's property legislation¹²⁸.

These were of course not the only sources of information. One notable feature of the nineteenth century was the frequency with which some leading colonial lawyers and politicians exchanged information on a personal, rather than an official basis. Thus S.W. Griffith in 1877 sent to a number of friends copies of the Judicature Act and Rules he had drafted for Queensland, and which had been passed as drafted. Copies went, *inter alia*, to Alfred Stephen in New South Wales; Ayers, Way and Boucaut in Adelaide and Robert Ramsay in Victoria. Way had received an earlier draft and reciprocated to some extent by sending Griffith a copy of a recent South Australian Judicature Act (about which Boucaut was somewhat critical¹²⁹.

The Victorian Parliamentary Draftsman appears to have had recourse to a a booklet or precis of the principles of drafting of documents called "*On Legislative Expression; or the Language of the Written Law*"¹³⁰. There is no evidence of the use of this work in other jurisdictions.

(iv) Work achieved

It is clear that the holders of the office found it difficult at times to perform all of the tasks expected of them. A letter written in 1888 by Alexander Oliver, the then Parliamentary Draftsman, to the Premier of New South Wales gives us a glimpse into the workings of the office¹³¹. Alexander Oliver, apparently in reply to a request from the premier, reported the work on hand in his department as including the revision of the District Court Bill, a Petty Sessions Bill, and other bills concerning the Wollongong Harbour Trust and an amendment to the quarantine laws, as well as a "very voluminous measure for Mines Department, dealing with Mines, and also Irrigation, Diseases in Stock; Impounding, Dogs, Noxious Animals and Plants and the protection of animals (260 clauses as it stood)".

However Oliver had made no progress on drafting of taxation Bills, having been "interrupted" by the Attorney-General referring to him matters requiring the perusal or preparation of bylaws and regulations, a task which he considered took half of his time. Indeed Oliver considered that he spent "9/10ths" of his time on matters referred to him from the departments of the Premier and the Chief Secretary or the Works and Finance Department, a matter apparently of relevance to suggestions that the Parliamentary Draftsman should be separated from its then administrative connection with the Attorney-General's office.

The Parliamentary Counsel's did not always find the connection with the Attorney-General's Department satisfactory. In 1894, the Attorney-General's

department sought to ensure that requests by other Ministers for the drafting of Bills be routed through the Attorney-General, and it appears that only reference to an earlier ruling by the Premier produced the concession that drafting instructions should go direct to the Parliamentary Counsel¹³².

This statement of work in hand in 1884 may be compared with others for July 1882 and November 1894. In 1882, the New South Wales Parliamentary Counsel had as tasks in progress seven general statutes, on subjects ranging from local government to registration of land titles by way of a bill on forests and one for the consolidation of the criminal law, as well as two local acts¹³³. By contrast in 1894, the Parliamentary Counsel had in hand ten draft bills, having completed 28 others in the previous three months as well making 60 reports on bylaws, rules and regulations as well as 35 more reports on other matters including private members' bills¹³⁴

CONCLUSION

As can be seen the colonial responses to the difficulties of ensuring there were adequate procedures for the preparation of legislation vary considerably. While resources may have been a key constraint, the divergence between South Australian practice and the institutionalisation of drafting in Victoria and New South Wales is not entirely to be explained on that basis. The particular responses of the different colonies may well owe a great deal to the political and social connections and ambitions of the lawyer-politicians of the day. It is to be hoped that more research will allow a more informed assessment of the events in the different colonies. But research should not stop there. The development of colonial law by legislation has not received the attention it deserves; the study of the administrative and parliamentary processes by which the

legislation was made has hardly been touched. There is a need to learn more about these processes. The extent to which the parliamentary draftsmen, whether permanent or part-time officials or contracted practitioners, were able, or willing, or both to impose their own structures and ideas on the form that legislation forms a part of the relationship between the political or bureaucratic proponents of a bill and the eventual form in which any consequent legislation emerged. Did the presence or absence of parliamentary draftsmen, and the degree to which back-bench members of the legislature had access to skilled and free drafting, affect the nature and frequency of private members bills? Was there a flow-on effect into the ratio of government measures and private member's bills? Robin Parsons has made a pioneering effort on this for two decades of the New South Wales parliament, but much more is needed¹³⁵. On a more abstract level, there is the question whether the presence or absence of permanent draftsmen had an influence on the nature and quality of legislative drafting. It may be that the perceptions of the judiciary as to the regard to be had to legislation, especially colonial legislation, was affected by the ease or otherwise of determining its meaning. These questions can only be determined by further detailed research. The answers may assist in forming a better understanding of the influences shaping Australian colonial statute law.

¹ An earlier draft of this paper was presented at the 49th Annual Conference of the Australasian Law Teachers Association in Hobart in September 1994. I am grateful for the helpful suggestions made by participants in the ensuing discussion.

² The word "drafting" appears to have been more commonly used later in the nineteenth century than was the older alternative "draughting", although there was a period where both were used. In one parliamentary report we find the headline referring to "draughting", the text to "drafting", see (1858) 3 VH 317.

³ For example see the various criticisms of the early Attorneys-General of van Diemen's Land by Alan Shaw in *"The British Contributions"*, in Roe, M (ed) *The Flow of Culture: Tasmanian Studies* (Australian Academy of the Humanities, Canberra, Occasional Papers No.4, 1987), p. 82 and *Sir George Arthur 1784-1854* (Melbourne UP 1980), pp. 95-97 and by B.A. Keon-Cohen *"Mad Judge Montagu: A Misnomer?"* (1976) 2 Monash LR 50.

⁴ R. M. Hague *History of the Law in South Australia* (unpublished typescript, 1937), (PRG 215/1/1, Mortlock Library, Adelaide), p.345

⁵ See John Gava *"The Revolution in Bankruptcy Law in Colonial New South Wales"* in Ellinghaus et al (eds) *The Emergence of Australian Law* (Butterworths of Australia, Sydney 1989), esp p. 216.

⁶ See Burt to Hampton, 1 May 1865, enclosed with Hampton to Cardwell, 20 July 1865; CO 18/143

⁷ Cooper to Attorney-General, 24 August 1861, see Index to Letters Received by Attorney-General's Office, file GRG-1/4, South Australian Public record Office (hereafter cited as SAPRO).

⁸ Dashwood to Attorney-General, 17 May 1865, Index to Letters Received by Attorney-General's Office, file GRG-1/4, SAPRO.

⁹ U Hubbe to Attorney-General, 28 March 1865, Index to Letters Received by Attorney-General's Office, file GRG-1/4, SAPRO

¹⁰ R C Baker 1868 SAPD 148

¹¹ As late as 1848, the Savings Bank Act 1848 of Van Diemen's Land was privately drafted; Denison to Grey, 6th November 1848, CO 280/228.

¹² Eg the solicitations of the South Australia company for bills for a toll road to Port Adelaide and a toll wharf thereat in 1839, see SAPRO, file GRG 2/73.

¹³ See Eg. Minute of March 26, 1849 of the Executive Council of South Australia on negotiations with syndicates seeking railway concessions in South Australia, which led to the enactment of the Adelaide City and Port Railway Co. Act 1850, No.1 (private); SAPRO GRG40/1/3.

¹⁴ Franklin to Glenelg, 30 Dec 1837, CO 280/81

¹⁵ Minutes of Exec. Co. of South Australia, 20 June 1839, SAPRO, file GRG/40/1/1.

¹⁶ Robin Parsons, *"Lawyers in the New South Wales Parliament 1870-1890: A study in the Legislative Role of Private Members"* (Ph.D. Thesis, Macquarie University, March 1972), pp.231 and 256.

¹⁷ There was perhaps one measure , the Settled Estates Act 1886 (NEW SOUTH WALES) where the Government of the day paid for the drafting of a private member's bill. Robin Parsons, *op. cit.* p.286

¹⁸ See 1868 SAPD 148

¹⁹ 1863 9 VH 321.

²⁰ See the sentiments variously expressed at 1868 SAPD 148; (1863) 9 VH 321, (1891) 4 WAPD 389 and (1891) 64 QPD (1st) 968-71

²¹ (1856) 1 VH 136-7; (1857) 2 VH 743; (1866) 2 VPD 84; cf Report of proceedings in NSW Legislative Assembly 5th Oct 1881, copy in Alexander Oliver papers, University of Sydney Library, (hereafter referred to as Oliver Papers, USL)

²² Cf Griffith's comment "I never heard of a Parliamentary Draftsman anywhere who is employed in drafting bills for private members" (1892) 67 QPD 376.

²³ (1863) 9 VH 321

²⁴ (1891) 64 QPD 971.

²⁵ The biography of Hearn by D.B. Copland, "*W E Hearn, First Australian Economist*" (Melbourne UP 1935), unfortunately almost completely ignores his activities in the law.

²⁶ See Sir Charles Gavan Duffy "*My Life in Two Hemispheres*" (2 vols, T. Fisher Unwin London 1898, facsimile edition Irish. U.P. 1969) vol. 2, pp. 227-234 and p.287.

²⁷ It has been argued that claims Ireland's 1867 statement meant no more than that there was a deliberate choice to omit mention of assigns in order to promote certainty of title, even though the risk of abuse of the Act was foreseen; see John Ireland, "*Three*

Cheers for Mr Ireland" (B.A.Hons.Thesis, University of Melbourne, 1988), La Trobe Library, Melbourne. Ireland's thesis cannot be said to be not entirely convincing.

²⁸ R C Baker 1868 SAPD 777. A politician of different hue, J P Boucaut during the same period suggested that a Parliamentary Draftsman would in effect instruct politicians on how to proceed, an equally unconstitutional proceeding, see 1868 SAPD 151.

²⁹ *Argus* 11 November 1858; *Age*, 9 November 1858.

³⁰ (1882) 38 QPD (1st) 1325, concerning a large fee paid to F A Cooper for a consolidation and index to the Queensland statutes.

³¹ e.g. (1879) 31 VPD 1501; 1889 SAPD 525

³² (1863) 9 VH 1229. See also (1863) 9 VH 1035.

³³ 1869 SAPD 813-4; 1890 SAPD 2250.

³⁴ (1858) 3 VH 317.

³⁵ (1856) VH 136-7 and (1866) 2 VPD 84.

³⁶ 1879 VPD 1499-1510; copy in Carlile papers, LaTrobe Library.

³⁷ See ADB, vol 5, p.362

³⁸ Watkins to Carlile 21 June and 23 August 23 1899, Carlile Papers La Trobe Library.

³⁹ For Wilkins's career, see H.T.E. Holt, *A Court Rises: The Lives and Times of the Judges of the District Court of New South Wales* (Law Foundation of New South Wales, 1976), pp.92-93

⁴⁰ Manning to Attorney-General, 25 January 1875, Miscellaneous documents file, Archives of the Parliamentary Counsel of New South Wales (hereafter cited as APCNSW). I would like to express my thanks to Mr Dennis Murphy, Parliamentary Counsel for New South Wales, for granting me access to the archives of his office

⁴¹ The following account is based on the documents in Miscellaneous documents file, APCNSW. Most were apparently published as a Parliamentary Paper by the Legislative Assembly in 1876 or 1877.

⁴²For the circumstances which forced Stephen to resign office in 1844 in South Australia after a scandal involving allegations of fraud, see R.M. Hague *History of the Law in South Australia* (unpublished typescript, 1937), pp. 167ff (PRG 215/1/1, Mortlock Library, Adelaide)

⁴³ See ADB, vol 2, 472-4.

⁴⁴ Lansdell to Minister of Justice, 10 July 1874, Miscellaneous documents file, APCNSW

⁴⁵ See ADB vol 7, p.194

⁴⁶ For Oliver's career, see ADB, vol 5, p.362.

⁴⁷ These details are drawn from the skeletal information in H.J. Gibbney and A.G. Smith *A Biographical Register 1788-1939* (ADB, Canberra, 1987), vol. 2, p.330

⁴⁸ All these figures are drawn from, or calculated from, two tables (one of 12 May 1891, one, not detailed, in 1892), appearing in Letter-book, APCNSW. The seventeen counsel mentioned were H Parkinson and E F Barton(1883), Macnaughten (1884), B R Wise, J W Stephen, R J Browning (1885), W P Cullen (1885-6); A R Butterworth (1887 and 1890), C G Wade (1887); Hanbury Davies (1887-88); A R Canaway(1889); P J Healey (1889-91);

(1889-91); A de Lissa (1891-92); W H Manning (1891); H Pollock, G E Rich and R G Ralston (all 1892)

⁴⁹ Martin to Minister of Justice 19 April 1887; Martin to Acting Under-Secretary for Justice, 30 April 1887 and Martin to Minister of Justice, 3 May 1888, all in Chief's Justice's Letterbook 1884-1905, file COD 89A-90, Government Archives of New South Wales (hereafter cited as GANSW), .

⁵⁰ Watkins to Secretary of Justice, 6 Oct 1892, Parliamentary Counsel's letterbook, APCNSW.

⁵¹ Watkins to Carlile 21 June and 23 August 23 1899, Carlile Papers La Trobe Library.

⁵² See Chapman to Minister of Justice, 18 August 1885 and other documents in file 5/7709.2, GANSW

⁵³ His comparative youth drew criticism from some quarters at the time of his appointment, though the appointment was defended by a range of politicians (1879) 31 VPD. 1500-02.

⁵⁴ See ADB vol 7, p.561

⁵⁵ See Box to Carlile 29 August 1899; Harriman to Carlile 30 June 1899 and Watkins to Carlile 21 June and 23 August 1899, Carlile papers, LaTrobe Library

⁵⁶ The Victorian Public Record Office, at Laverton, holds only thirteen files of bills prepared before 1900, though in some cases more than one draft bill is included.

⁵⁷ See documents in file VPRS.10265/3, VPRO.

⁵⁸ see documents in file VPRS.10265/152 VPRO.

⁵⁹ J.A. Gurner, "*Life's Panorama*" (Lothian Publishing Co, Melbourne, 1930).

⁶⁰ Ibid, esp. p.267

⁶¹ Victorian Railway Commissioners Act 1883 (Vic) and Public Service Act 1883 (Vic).

⁶² One of the few to mention it all is B.H. McPherson *A History of the Supreme Court of Queensland 1859-1961*, who only mentions it twice in passing (pp 117n and 333). There are no archival records of which I am aware.

⁶³ See ADB, vol 3 p. 219

⁶⁴ See the debate at (1865) 2 QPD (1st ser.) 656-688; and the slightly different version in Bowen to Cardwell, 15 September 1865, CO 234/13, folios 243ff.

⁶⁵ Pring to Bramston, 7 May 1863 Attorney-General's letterbook 1861-4, 11/63, file JUS/G1, Queensland Public Record Office (hereafter cited as QPRO).

⁶⁶ (1864) 1 QPD 30

⁶⁷ Pring to McParlane 31 Dec 1862, Attorney-General's letterbook 1861-4, 62/309, file JUS/G1, QPRO

⁶⁸ Bowen to Cardwell, 15 September 1865, CO 234/13, folios 243ff.

⁶⁹ For details of Griffith's life, see R B Joyce *Samuel Walker Griffith* (U Queensland Press, 1984) and A B Graham *The Life of the Right Honourable Sir Samuel Walker Griffith* (University of Queensland, 1938). Neither work does more than mention in passing his work in drafting legislation.

⁷⁰ (1891) 64 QPD (1st) 968.

⁷¹ (1891) 64 QPD (1st) 969.

⁷² (1891) 64 QPD (1st) 970.

⁷³ (1891) 64 QPD 970 and (1892) 67 QPD 374. For the use of similar arguments in South Australia, see 1868 SAPD 149.

⁷⁴ C.A. Bernays, *Queensland Politics during 60 Years* (Government Printer, Brisbane, 1921), pp. 11, 13 and 43.

⁷⁵ Blakeney to Under Colonial Secretary, 1 July 1893 - forwards a draft bill "prepared by Mr Shand" in file JUS/W2, QPRO. One curiosity of the Bill was that although it drew heavily on other Australian statutes in *pari materia*, the marginal notes to the Bill as printed referred solely to a United Kingdom Act.

⁷⁶ List of bills for 1898 in File JUS/W22, QPRO. The draftsmen involved and the number of bills drafted is given as Kingsbury (3); Woolcock (3); Blair (1); Shand (5); Chambers (1); King (1); "Crown" (1); "Under-secretary" (1); Sydes (1); Power (1); Leeper (4) and Rutledge (2).

⁷⁷ Mcpherson, *op. cit.* p.333

⁷⁸ See the different views of this issue by Cookworthy (1893) 4 WAPD 389 and Septimus Burt, the Attorney-General, (1893) 4 WAPD 394.

⁷⁹ Canning, (1893) 4 WAPD 391, and Burt, (1893) 4 WAPD 394.

⁸⁰ Burt claimed in 1893 that more than 100 bills had been passed into law since 1890, and only two, the Transfer of Land Bill and the Customs Bill (drafted by the head of the Customs Department in Melbourne) had been briefed out: (1893) 4 WAPD 394.

⁸¹ Memo by Watkins, 13 December 1892, and Watkins to Under-secretary for Trade and Finance 11 October 1895, Letter-book, APCNSW

⁸² Forrest to Griffith 1 October 1890, SW Griffith papers, file MSQ.186, Dixson Library. Emphases in original.

⁸³ Forrest to Griffith, 17 Nov 1890, SW Griffith papers, file MSQ.186, Dixson Library

⁸⁴ Lansdell to Minister of Justice, 10 July 1874, Miscellaneous documents file, APCNSW.

⁸⁵ 1875 Tas.H.A. Jo. No.4.

⁸⁶ I am indebted to Mr Stefan Petrow, Law Librarian at the University of Tasmania for this information, and for the reference in the following note.

⁸⁷ R. L. Wettenhall *A Guide to Tasmanian Government Administration* (Platypus Publications, Hobart, 1968), pp 87-88.

⁸⁸ The following discussion is drawn from data in the Record of Bills introduced, File GRG 1/66, South Australian Public Record Office (hereafter cited as SAPRO)

⁸⁹ 1862 SAPP no. 215.

⁹⁰ In 1869, a fee of £200 asked by one C. Fenn for drafting the Local Courts Bill and amendments was considered too high, and the matter was eventually settled at a compromise figure of £160; Fenn to Attorney-General 14 Sep 1868, General, Attorney-General's correspondence, GRG 1/4, SAPRO.

⁹¹ The Administration of Probate Bill 1891 was initially drafted by Charles Mann, but the final details were settled by E Parris Nesbit. See notes on draft in scrap-book of Richard Baker, file PRG 38/11, State Library of South Australia.

⁹² Mann to Attorney-General, 6 January 1865, file GRG-1/4, SAPRO.

⁹³ Mann to Attorney-General 4 March 1867, file GRG-1/4, SAPRO.

⁹⁴ Lowe to Attorney-General 1 November 1866, file GRG-1/4, SAPRO.

⁹⁵ Lowe to Attorney-General 7 and 23 April, 1, 4 and 28 May, 23 July, 15 and 18 August, 11 September and 1 November 1866. File GRG-1/4, SAPRO.

⁹⁶ C Lowe to Attorney-General, 24 Nov 1868, file GRG-1/4, SAPRO

⁹⁷ 1885 SAPD 342

⁹⁸ 1885 SAPP No. 146.

⁹⁹ Copy in Miscellaneous documents file, APCNSW.

¹⁰⁰ Report of proceedings in NSW Legislative Assembly 5th Oct 1881, copy in Oliver Papers, USL)

¹⁰¹ See Watkins to Critchell Walker, August 9, 1893; Critchell Walker to Watkins 4 August 1894 and Watkins to Critchell Walker 9 August 1894, Miscellaneous documents file, APCNSW.

¹⁰² See G C Addison to RHD White MLC and Critchell Walker to Watkins, 28 Sept 1894, Miscellaneous documents file, APCNSW.

¹⁰³ e.g. see Watkins to I L T McGowrie, MLA, 20 Nov 1893 and Watkins to P Waddell, MLA, 20 Nov 1893, Letter-book, APCNSW.

¹⁰⁴ Ibid.

¹⁰⁵ See documents in file in VPRS 10265 series, VPRO

¹⁰⁶ (1883) 1 NSWPD (1st Series) 119

¹⁰⁷ (1883)3 NSWPD (1st Series) 2914-16

¹⁰⁸ Watkins to Attorney-General, 12 Jan 1893, Letter-book, APCNSW

¹⁰⁹ Watkins to Under-Secretary of Finance and Trade, Jan 6 1893, Letter-book, APCNSW.

¹¹⁰ See Oliver's manuscript notes on extract from *Daily Telegraph* 2nd August 1890, Oliver Papers, University of Sydney Library (hereafter cited as USL), discussed infra below.

¹¹¹ J.M. Bennett, *Portraits of the Chief Justices of New South Wales* (John Fergusson Pty Ltd, Sydney 1977), p.32

¹¹² CF Griffith's views to this effect in (1891) 64 QPD 377.

¹¹³ Garnett to Oliver, June 7th 1887, Oliver Papers, USL

¹¹⁴ Parkes to Oliver, December 19 1879, Oliver Papers, USL

¹¹⁵ See Oliver's manuscript notes on extract from *Daily Telegraph* 2nd August 1890, Oliver Papers, USL.

¹¹⁶ (1891) 64 QPD 970-1.

¹¹⁷ Extract from *Star* newspaper, 16th November 1893, in Oliver papers, USL..

¹¹⁸ Carruthers to Oliver, March 11 1897 (Rabbit Bill); Carruthers to Oliver, September 19 1894 (Land Bill) and Brunker to Oliver, n.d. but 1896, (Fisheries Bill) Oliver Papers, USL.

¹¹⁹ Holden and Oliver to Cowper (n.d. but August 1863) and Holden to Cowper 27 June 1865, in Colonial Secretary's Papers file 4/742.2, GANSW.

¹²⁰ Cf. E.A. Russell, *A History of the Law in Western Australia*, (UWA Press, 1980) p. 41

¹²¹ Oliver to Secretary to Attorney-General, 9 August 1878, Letter-book, APCNSW

¹²² Oliver to Attorney-General, 20 Sept 1880, Letter-book, APCNSW.

¹²³ Watkins to Secretary to Attorney-General, 11 April 1893, Letter-book, APCNSW.

¹²⁴ Oliver to Government Printer, 26 August 1887 and 30 August 1887, Letter-book, APCNSW.

¹²⁵ Watkins to Secretary to Attorney-General, 17 May 1894- Letter-book, APCNSW.

¹²⁶ Watkins to Secretary to Attorney-General, 23 August 1895, Letter-book, APCNSW

¹²⁷ Watkins to Government Printer, 18 April 1896, Letter-book, APCNSW

¹²⁸ See Oliver to Principal Under-secretary; Chief Secretary's Department , 10 Sept 1880 and Oliver to Government Printer, 15 July 1885, Letter-book, APCNSW

¹²⁹ Stephen to Griffith 12 March 1877; Ayers to Griffith 2 June 1877; Way to Griffith 5 June 1879; Boucaut to Griffith, 20 June 1877; Ramsay to Griffith 19 March 1877; Griffith papers, File MS.Q185, Dixon Library.

¹³⁰ "Extract from a Memorandum on the Compilation of Appendices (A) and (B) to the Report of the Poor Law Commissioners on Local Taxation to her Majesty's Principal Secretary of State for the Home Department" House of Commons Papers 1843, vol.xx, pp.133-157. Copy in Carlile papers, La Trobe Library.

¹³¹ Oliver to Parkes, 29 August 1888, Miscellaneous documents file, APCNSW.

¹³² Memoranda by Secretary to Attorney-General 21 August 1894, by J.L.Watkins not dated and by Dibbs, 12 March 1894, all in Miscellaneous documents file, APCNSW

¹³³ Alexander Oliver to Critchell Walker, 3 July 1882, Letter-book, APCNSW.

¹³⁴ JL Watkins to Secretary to Attorney-General, 8 Nov 1894, Letter-book, APCNSW.

¹³⁵ See Robin Parsons "*Lawyers in the New South Wales Parliament 1870-1890: A study in the Legislative Role of Private Members*" (Ph.D. Thesis, Macquarie University, March 1972), pp.231 and 256.